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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

v.

WILLIE DWAYNE MICKEY,
Defendant.

Crim. Case No. 3:15-cr-1201-BTM-1
Civ. Case. No. 3:19-cv-0554-BTM

**ORDER DENYING DEFENDANT
WILLIE DWAYNE MICKEY’S 28
U.S.C. § 2255 MOTION AND
DENYING A CERTIFICATE OF
APPEALABILITY**

[ECF Nos. 145, 147]

Before the Court is Defendant Willie Dwayne Mickey’s motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 as well as a supplemental § 2255 motion. (ECF Nos. 145, 147.) Defendant, proceeding *pro se*, argues that his appointed trial counsel provided ineffective assistance by failing to seek or otherwise provide Defendant with various discovery documents such that he was unable to make an informed decision about whether to proceed to trial. (ECF No. 145.) Defendant also argues that the two counts for which he was convicted were multiplicitous and thereby violated his rights under the Fifth Amendment. (ECF No. 147.) The Government opposes the relief requested by Defendant. (ECF No. 148; see *also* ECF No. 157 (Defendant’s reply).)

As an initial matter, Defendant’s factual assertions that his trial counsel failed

1 to seek relevant discovery materials, including any *Brady* materials or grand jury
2 transcripts, (ECF No. 145, at 16-19), are conclusively contradicted by the record.
3 (See ECF No. 29 (co-defendant's first motion to compel discovery); ECF No. 34
4 (Defendant's notice of joinder to first motion); ECF No. 48 (co-defendant's second
5 motion to compel); ECF No. 53 (Defendant's notice of joinder to second motion);
6 see also ECF No. 35 (Government's response to first motion); ECF No. 49
7 (Government's response to second motion); ECF No. 54 (minute order granting
8 both motions to compel).) Further, even assuming that Defendant's double
9 jeopardy argument is not procedurally defaulted by his failure to raise it on direct
10 appeal, see *United States v. Ratigan*, 351 F.3d 957, 962 (9th Cir. 2003), it is
11 frivolous given that each count of sex trafficking by force, fraud or coercion in
12 violation of 18 U.S.C. §§ 1591(a) & (b)(1) for which he was convicted addressed
13 separate (albeit similar) conduct and victims over partially-overlapping intervals.
14 (See ECF No. 77 (second superseding indictment); ECF No. 102 (special verdict
15 form); ECF No. 131 (judgment).); See *United States v. Schales*, 546 F.3d 965,
16 978 (9th Cir. 2008) ("The Double Jeopardy Clause does not . . . prohibit the
17 government from prosecuting a defendant for multiple offenses in a single
18 prosecution."); *United States v. Davenport*, 519 F.3d 940, 943 (9th Cir. 2008) ("The
19 Fifth Amendment's prohibition on double jeopardy protects against being punished
20 twice for a single criminal offense."); *United States v. Stewart*, 420 F.3d 1007, 1012
21 (9th Cir. 2005) ("An indictment is multiplicitous when it charges multiple counts for
22 a single offense, producing two penalties for one crime and thus raising double
23 jeopardy questions.").

24 As to his allegations that counsel failed to apprise him of relevant discovery
25 materials, "there are two components to an [ineffective assistance] inquiry, and
26 [Defendant] bears the burden of establishing both." *United States v. Quintero-*
27 *Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995). "First," Defendant must establish that
28 "the representation . . . f[e]ll 'below an objective standard of reasonableness.'" *Id.*

1 (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Second, “he
2 must . . . establish that there is ‘a reasonable probability that, but for counsel’s
3 unprofessional errors, the result of the proceeding would have been different.’” *Id.*
4 (quoting *Strickland*, 466 U.S. at 694). Here, Defendant attests that his trial
5 “[c]ounsel never furnished [Defendant] with any ‘*Brady*’ material, police investigative
6 notes[,] FBI ‘302’s’[,] electronic discovery (including any emails, text messages,
7 audio, video, or chat-messages)[,] or Grand Jury Testimony of any witness it
8 intended to introduce at trial for impeachment purposes or for [Defendant] to test
9 the strength of the Government’s case against [him,]” and that had counsel done
10 so, Defendant “would have not proceeded to trial and would have entered a plea
11 of guilty.” (ECF No. 145, at 24-25.) Further, Defendant argues, without any
12 supporting attestations, other evidentiary support, or even further factual
13 development, that his trial counsel failed to “[c]ommunicate to [Defendant] the
14 intricacies of the [United States] Sentencing Guidelines, including credit for
15 acceptance of responsibility, any downward variance that could have been sought,
16 as well as other factors in mitigation of any sentence if a guilty plea were to be
17 entered.” (ECF No. 145, at 19; see also *id.* at 22-25). Even assuming that
18 Defendant could demonstrate that the discovery materials of which he complains
19 actually existed, were material to his prosecution or defense, were in his trial
20 counsel’s possession or control but not provided to Defendant, were not otherwise
21 known to Defendant, or that trial counsel’s failure to provide these materials (or his
22 analysis thereof) to Defendant was otherwise objectively unreasonable, or that his
23 trial counsel failed to advise Defendant of the aforementioned sentencing issues
24 and was therefore objectively unreasonable, however, Defendant has failed to
25 demonstrate prejudice resulting therefrom.

26 Here, Defendant does not rely upon a “phantom” plea bargain to
27 demonstrate prejudice. (See ECF No. 145, at 19 (but for counsel’s ineffective
28 assistance, Defendant “would not have proceeded to trial and would have plead

1 guilty, *obtained credit for acceptance of responsibility*, and moved the Court for
2 any downward variance that may have been available at sentencing” (emphasis
3 added).) However, Mickey points to no discovery material that, had it been shown
4 to him, would have resulted in his pleading guilty. He purely speculates that if it
5 had been shown to him, he would have pled guilty.

6 Furthermore, the Defendant fails to produce or identify any evidence
7 demonstrating with a reasonable probability that, even if he had plead guilty, the
8 Court would have been inclined to grant him any adjustment for acceptance of
9 responsibility. See *United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004)
10 (“To receive the two-point downward adjustment [for acceptance of responsibility
11 under U.S.S.G. § 3E1.1(a)], a defendant must at least show contrition or
12 remorse.”); see also U.S.S.G. § 3E1.1(b) (additional one-point downward
13 adjustment conditional on qualification for two-point adjustment under § 3E1.1(a)).
14 Indeed, Defendant’s decision to proceed to trial is not dispositive of the grant or
15 denial of such an adjustment. See *United States v. Innie*, 7 F.3d 840, 848 (9th Cir.
16 1993) (“Although a district court may not punish a defendant for failing to
17 participate in fact-gathering at a presentence interview or for not pleading guilty,
18 the defendant must carry the burden of demonstrating the acceptance of
19 responsibility.”); U.S.S.G. § 3E1.1, cmt. 2 (“Conviction by trial . . . does not
20 automatically preclude a defendant from consideration for such a reduction.”);
21 U.S.S.G. § 3E1.1, cmt. 3 (“A defendant who enters a guilty plea is not entitled to
22 an adjustment under this section as a matter of right.”). Rather, the evidence of
23 record demonstrates that Defendant continued to dispute his guilt during
24 sentencing proceedings, (see ECF No. 136, at 18-19, 31-32 (Defendant continued
25 to dispute his guilt during sentencing hearing), and Defendant has failed to provide
26 or identify any evidence demonstrating his subsequent contrition or remorse for
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1 his offenses or that he qualified for any other departures or variances.¹

2 Moreover, even assuming Defendant had demonstrated his entitlement to
3 an acceptance of responsibility adjustment, he has failed to demonstrate with
4 reasonable probability that such adjustment would have had any appreciable effect
5 on his sentence of 204 months of imprisonment. Defendant was convicted of
6 offenses subject to mandatory minimum sentences of 180 months. 18 U.S.C. §
7 1591(b)(1). Further, the presentence investigation report reflects Defendant's total
8 offense level as 38 with five criminal history points (*i.e.*, a criminal history category
9 of III), which resulted in a guideline imprisonment range of 292 to 365 months.
10 (ECF No. 106, at 9-15.) Even if Defendant had been granted a full three-point
11 reduction for acceptance of responsibility (*i.e.*, a total offense level of 35), this
12 would have resulted in a guideline imprisonment range of 210 to 262 months.²
13 Nevertheless, the Court departed downward from these guideline ranges when it
14 sentenced Defendant to 204 months, finding that "a sentence of 17 years . . .
15 provide[s] a deterrence and fair punishment for the offense and promote[s] respect
16 for the law."³ (See ECF No. 136, at 37-38.). That is, even *without* the benefit of
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19 ¹ See ECF No. 136, at 31 ("I do apologize for, you know, this whole process, but I
20 do maintain my innocence. I never forced anybody to do anything. And if anybody
21 did anything, it was because they was willing and they was adults making their
22 own choices and their own decisions, but I never forced anybody to do anything
23 against their will.").

24 ² Were Defendant granted a two-point reduction for acceptance of responsibility
25 (*i.e.*, a total offense level of 36), this would have resulted in a guideline
26 imprisonment range of 235 to 293 months.

27 ³ (See ECF No. 136, at 38 ("The question is what is the minimal sentence that will
28 deter [Defendant], deter others, and not create sentencing disparities in the federal
system and also provide just punishment. The Court believes that a sentence of -
- on both counts concurrently of 204 months is the sentence that will do that. It's
two years above the mandatory minimum of 180 months, and that takes into

1 an acceptance of responsibility adjustment, Defendant ultimately ended up
2 receiving a lower term of imprisonment than suggested by the sentencing
3 guidelines *with* the benefit of an acceptance of responsibility adjustment. Thus,
4 the actual sentence of imprisonment imposed by the Court already represents a
5 significant departure from the range recommended by the United States
6 Sentencing Guidelines. Defendant's unsubstantiated assertions that he would
7 have plead guilty and sought an acceptance of responsibility adjustment, without
8 more, are insufficient to demonstrate prejudice.⁴

9 Based upon the foregoing, Defendant's § 2255 motion and supplemental
10 motion (ECF Nos. 145, 147) are **DENIED**.⁵ The Court **DENIES** a Certificate of
11 Appealability to Defendant because he has not even raised a colorable claim in his
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14 account the multiple counts. If Count 1 fails ultimately, I would impose a lesser
15 sentence, but I don't know at this point how much less, but it would not be a moot
16 point. It may not be much less. Of course, it can't be below 180. I won't think
17 about that now because it's not an issue, but I think a sentence of 17 years sends
a message, and it's not overkill. It does provide a deterrence and fair punishment
for the offense and promote respect for the law.”.)

18 ⁴ Defendant argues in his § 2255 motion, without any supporting attestations or
19 other evidentiary support, that his trial counsel failed to “[c]ommunicate to
20 [Defendant] the intricacies of the [United States] Sentencing Guidelines, including
21 credit for acceptance of responsibility, any downward variance that could have
22 been sought, as well as other factors in mitigation of any sentence if a guilty plea
were to be entered.” (ECF No. 145, at 19; *see also id.* at 22-25).

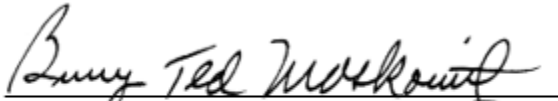
23 ⁵Because “the record refutes [Defendant's] factual allegations or otherwise
24 precludes habeas relief, [the Court] is not required to hold an evidentiary hearing.”
25 *Schriro v. Landrigan*, 550 U.S. 465, 474-75 (2007) (district court did not err in
26 denying evidentiary hearing where, “even with the benefit of an evidentiary
27 hearing, [the defendant] could not develop a factual record that would entitle him
28 to habeas relief.”); 28 U.S.C. § 2255(b); *see also Farrow v. United States*, 580 F.2d
1339, 1360-61 (9th Cir. 1978) (“A petitioner is not entitled to a hearing where he
presents no more than conclusory allegations, unsupported by facts and refuted
by the record.”).

1 § 2255 motion.

2 **IT IS SO ORDERED.**

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4 Dated: November 12, 2020


Honorable Barry Ted Moskowitz
United States District Judge

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